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No. 373

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

SYLVANIA ELECTRIC PRODUCTS INC., *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent,*

and

LOCAL 352, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

GERARD D. REILLY
LAWRENCE T. ZIMMERMAN
1120 Tower Building
Washington, D. C. 20005

BRUCE CARSWELL
JAMES P. HEFFERNAN
730 Third Avenue
New York, New York 10017

Attorneys for Petitioner

Of Counsel:

REILLY AND WELLS
1120 Tower Building
Washington, D. C. 20005

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Sylvania Electric Products Inc. petitions for a writ of certiorari to review the judgment and decree of the United States Court of Appeals for the First Circuit issued on April 5, 1966, rehearing denied on April 21, 1966.

OPINIONS BELOW

The decision of the court of appeals (App. A, *infra*, pp. 1a-4a) is reported at 358 F. 2d 591 and at 61 LRRM 2657. The decision and order of the National

Labor Relations Board (J.A. 51-68),[1] 154 NLRB No. 149, is not yet officially reported.

JURISDICTION

The judgment and decree of the court of appeals were entered on April 5, 1966. A petition for rehearing was timely filed on April 18, 1966 and denied on April 21, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Is an employer guilty of a refusal to bargain under the National Labor Relations Act where he refuses to furnish to the union representing his employees information concerning matters outside the scope of "wages, hours, and other terms and conditions of employment"—in this case the estimated costs of increases proposed by the employer in the group insurance and pension program which he wholly finances—when the employer himself at no time during bargaining negotiations puts such collateral matters in issue.

2. Is an employer engaged in renegotiating with a union a collective bargaining agreement containing provisions for group insurance and pensions wholly financed by such employer, guilty of a refusal to bargain under the National Labor Relations Act if he offers to improve at his own expense the level of bene-

[1] The reference to "J.A." is to the Consolidated Joint Record Appendix in Case Nos. 6623 and 6646 in the court of appeals. Review is sought only with respect to Case No. 6623, however. Numbers preceding a semicolon refer to those portions of the stenographic transcript of proceedings that are printed in the Appendix; those following a semicolon refer to the trial examiner's decision, which was adopted *in toto* by the Board.

fits under such plans, without disclosing, at the request of the union representatives, the cost he will thereby incur.

STATUTE INVOLVED

The statutory provisions involved are Sections 8(a)(5) and 8(d) of the National Labor Relations Act (herein called the "Act"). They are printed in Appendix B hereto, *infra,* pp. 4a-6a.

STATEMENT OF THE CASE

A. Nature of the Proceeding

This case involves an order of the National Labor Relations Board (herein called the "Board"), enforced by the court of appeals, requiring petitioner to cease and desist from refusing to bargain collectively with Local 352, International Union of Electrical, Radio and Machine Workers, AFL-CIO (herein called the "Union") and to furnish upon request the costs or estimated costs of recently negotiated improvements in the existing pension and group insurance programs.

B. The Earlier Sylvania Case

To put both the facts relating to bargaining negotiations and the opinion of the court below in perspective, reference to an earlier decision regarding the same employer, rendered by the same court of appeals in 1961, appears to be in order at this point. In *Sylvania Electric Products Inc.* v. *NLRB,* 291 F. 2d 128 (C.A. 1, 1961) cert. denied 368 U.S. 926, the same court of appeals set aside an order of the Board which imposed the duty upon Sylvania during the course of

its bargaining negotiations at one of its other plants, to disclose to the Union the current and past costs of a group insurance plan that the company wholly financed. The court there held that employer contributions to a plan wholly paid for by the employer were not "wages" under the Act and consequently there was no obligation to furnish information regarding them. Inasmuch as the company did not resist any demands by the union on the ground that costs would be excessive, and at all times bargained on the basis of the level of benefits to the employees, the court found no duty on the part of Sylvania to provide cost data to the union to support its position.

C. Statement of Facts

This case arose in a Sylvania plant at Batavia, New York, covered by collective bargaining contracts with the charging union for more than a decade (J.A. 6; 54). The contract at this plant, prior to the controversy giving rise to this case, had included a pension plan administered at one of the divisional headquarters of the Company at Salem, Massachusetts (J.A. 109), and a comprehensive accident, sickness, disability and life insurance plan (J.A. 97)—both of a non-contributory character.

The 1962 agreement was to expire September 30, 1964 (J.A. 16; 54). On March 30[2] the Union expressed to the Company its interest in an early beginning to negotiations (see J.A. 176), and followed this by a request in a letter dated June 11, for certain cost information involving past and current plans which it stated was "necessary for intelligent bargaining"

[2] All dates refer to 1964 unless otherwise specified.

(J.A. 85). The information requested was the following (J.A. 85):

> "1) for the pension program copies of the actuary's valuation, the Trustee's report and the D-2 report for the last two years as well as age, sex, and seniority distribution in five year groups, i.e., under 25, 25-29, 30-34, etc. to a group age 65 and over.
>
> "2) for the insurance program as a whole and each aspect such as life insurance, weekly sickness and accident, hospitalization, surgery, major medical for each of the last two years broken down by active employees, dependents and retirees:
>
> a. premiums paid by the company
>
> b. claims paid
>
> c. dividends (refund of excess deposits)
>
> d. reserves at the beginning of the year
>
> e. additions to reserves during the year
>
> f. interest on reserves received during the year
>
> g. retention and administrative expense
>
> h. commissions paid
>
> "3) for the savings and security plan the amounts of company and employee contributions, the Trustee's report, the plan portfolio and D-2 reports of each of the last two years."

In response to this request, the Company on July 21 furnished a substantial amount of information, including documents showing costs, on its pension plan and group insurance plan (J.A. 86-153; 55).[3] The pension plan information, covering the years 1962 and 1963, showed the payments made by the Company

[3] The savings and security plan is not involved in this case.

(J.A. 101-115), the actuarial assumptions used (J.A. 111), the Trustee's Report (J.A. 119-122), and the age, sex and seniority breakdown for the bargaining unit employees (J.A. 117). The group insurance information showed among other things claims and premium expenses for the years 1962 and 1963 (J.A. 89-100, 118). The Union never questioned the sufficiency of this information (J.A. 23-24).

At no time, however, did the Union negotiating committee examine this information (J.A. 23). The principal union negotiator, Peter Scibetta, merely forwarded the documents to Earl Kipp, assistant director of the international union's pension and insurance department in Washington, D. C. (J.A. 24). Neither the negotiating committee nor Kipp ever questioned the adequacy of the information (J.A. 23-24)

Bargaining commenced on July 24, continued on fifteen separate days, and culminated in the execution of a new contract on October 1 (J.A. 7, 16, 36; 56, 60). Nevertheless, the union which agreed to the contract, insisted upon pressing the charge it had filed one week previously with the Board. The contract in effect during negotiations contained a pension plan and an insurance plan both of which were fully paid for by the Company; no contributions thereto were made by employees (J.A. 7, 39; 59-60). The proposals of both the Union and Company for improvements in these plans, and the improvements finally agreed upon, were based upon the understanding that the Company would bear the entire cost (J.A. 7, 39; 54).

The Union first proposed improvements in the pension and insurance plans at the opening bargaining session on July 24 (J.A. 8; 56). The Company offered

improvements in the two plans on August 10 (J.A. 24; 56). It was not until September 23—over a month after the Company had submitted its proposals and a week before the contract was signed—that the Union made a specific request for a cents per hour breakdown of the estimated cost of the Company's proposal (J.A. 32, 39; 58, 64).[4] The chief Company negotiator, Joseph Gill, denied this request, pointed out to the Union that the Company was bargaining on the level of benefits to the employees and not on the cost to the Company (J.A. 32, 39; 58) and reminded the Union that the benefits were non-contributory on the part of the employees (J.A. 39).

The Union reiterated its oral request of September 23 by letter on that date (J.A. 173). In a letter dated September 25 the Company noted that the Union's request was directed to non-contributory improvements in pensions, insurance and vacations,[5] and that such benefits were provided by the Company without diminution regardless of any increase in costs during the term of the agreement (J.A. 174; 59-60). The Union repeated its request for the information on September 28 (J.A. 16), and once again was turned down (J.A. 16).

The Company's chief negotiator, Gill, knew of the court of appeals' decision in the 1961 *Sylvania* case and prior to negotiations had discussed with the Company's manager of labor relations the matter of furnishing the Union with cost information if the Union

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[4] There was conflicting testimony as to whether any request for a cost breakdown was made earlier (see *infra*, pp. 8-9).

[5] Scibetta's testimony suggests that the Union's request was narrower than that, in that the information it sought was limited to the insurance and pension program (J.A. 17).

should request it (J.A. 36-37). At the outset of negotiations Gill told the Union that the Company would not profess inability to pay the cost of any of the items to be negotiated (J.A. 38). Throughout the course of negotiations the Company never quoted any cost to the Union with respect to its proposal as a whole, or with respect to the pension or insurance components (J.A. 38). Gill did point out that the Company considered cost in the formulation of its proposals (J.A. 39). The Company adhered to the position that it was bargaining on the level of benefits to the employees, not the cost to the Company (J.A. 41), and that it was not obligated to furnish the requested cost information to the Union.

Any importance to the cost issue was not readily apparent in negotiations. Although it was Scibetta's testimony that the Union first asked Gill on August 12 "if he would break down the economic offer they were making with respect to all things that were contained in it" (J.A. 11)—an assertion flatly denied by Gill (J.A. 36-37)— he acknowledged that the Union committee's notes of that day's negotiations did not specify any such request to the Company (J.A. 26). Moreover, Scibetta at no time during negotiations asked the Union's pension experts in Washington to evaluate the pension or the insurance improvements proposed by the Company in terms of cost (J.A. 21, 24). Nor was there any discussion of costs at the meeting of September 8, even though on that day Earl Kipp, the international union's pension expert, took an active part in bargaining (J.A. 12-13).

Scibetta testified that he made another request for a cost breakdown on September 17—this too was denied by Gill (J.A. 36-37)—but at most his reference to

cost was directed to a proposed change in the job evaluation system. This request, if it was raised at all, was quickly dropped when negotiations turned to other matters (J.A. 26). The only written request for cost information, apart from the July request pursuant to which the Company furnished a number of documents, was the Union's letter of September 23.

Scibetta, who had participated in negotiations with the Company covering its Buffalo plant about 40 miles away[6]—where the Company had made the same offer—was aware of no request by the Union in those negotiations for cost information (J.A. 20, 28). On September 23 the Union indicated to the Company for the first time that it was interested in comparing the cost of the package at Buffalo to the proposals at Batavia (J.A. 33) and might wish to divert the proposed increases to other benefits (J.A. 33-34). However, the Union committee never asked its pension department what information it might need to estimate the cost of the proposals, and Scibetta admitted that he had no intention of making an estimate himself (J.A. 30).[7] Scibetta nevertheless did venture the opinion to the Company that there was a differential of 5 or 6 cents between the Batavia and Buffalo offers (J.A. 20, 29, 41).

The only written estimate available to the Company regarding pension and insurance improvement costs was a document prepared on a company-wide but not a plant-wide basis (J.A. 40, 43). The benefits under the

[6] The Buffalo contract was executed on August 31, 1964, a month prior to the settlement at Batavia (J.A. 40).

[7] Nor did he indicate to the Company that he did not have enough information to make an estimate of the cost of the Company's offer (J.A. 29).

pension and group insurance plans were, with a few exceptions, the same throughout the approximately 38 plants of the Company (J.A. 39, 40).

D. The Decision of the Trial Examiner and Board

The complaint issued by the General Counsel alleged that the Company had violated Section 8(a)(5) and (1) of the Act by refusing to furnish the Union "data related to the cost of insurance and pension programs" proposed by the Company (J.A. 83). The Company admitted that it had refused to furnish such information (J.A. 61), but denied the commission of any unfair labor practice.

A hearing was held before a trial examiner of the Board, who issued his decision on July 9, 1965 (J.A. 52-67). At the outset of the hearing Board counsel was invited by the examiner to state his theory of the case. His opening remarks made clear that he was not relying upon any premise that the instant case was distinguishable from the earlier *Sylvania* case, but rather upon the ground that the Board had in a subsequent opinion—*Electric Furnace Co.*, 137 NLRB 1077, 1080—announced its disagreement with the First Circuit's decision. The trial examiner held that the Company violated the Act. He adhered to the Board's rationale in the earlier *Sylvania* case that premium costs of both a contributory and non-contributory insurance program constitute "wages" under the Act and hence must be supplied upon request.

He also concluded, however, that the earlier *Sylvania* case was distinguishable on the ground that "the record shows that in the instant case Respondent itself made costs a relevant bargaining issue" (J.A. 62). As support for that hypothesis he relied upon the

fact that the Company spokesman, Gill, had pointed out that the Union's proposals would be costly (J.A. 62-63). Having thus arrived at a statutory duty to furnish cost information, he refused to draw any distinction between actual costs and estimates of costs, and also rejected the Company's contention that the Union failed to show any necessity for the requested information (J.A. 13). As to the latter he declared that necessity is conclusively presumed if the information sought is found to be relevant (J.A. 63-64).

The trial examiner hedged with respect to the purported Union requests of August 12 and September 17. He expressly did not decide whether a specific cost breakdown in cents per hour had been made prior to September 23 (J.A. 59), but instead ambiguously found that a cost breakdown had been requested in "general terms" prior to that time (J.A. 57, 58). He concluded that the Company had violated the Act by failing to furnish the cost information "at least on and after September 23" (J.A. 64).

The Board simply adopted, without independent opinion of its own, the findings, comments and recommended order of the trial examiner (J.A. 51-52).

E. The Decision of the Court Below

A wholly different approach was taken by the court of appeals, which rejected both theories of the trial examiner. The court explicitly adhered to its earlier view that premium costs of an employer's non-contributory welfare and pension program are not mandatory subjects for bargaining. It quoted its earlier statement that

> "to define an employer's contribution to a non-contributory welfare program as 'wages' to the

> employees . . . would expand the concept of wages so far as to break down if not destroy, the distinction in the Act between 'wages, hours, and other terms and conditions of employment' as to which there is a mutual mandatory duty to bargain collectively, and those matters as to which each party is free to bargain or not to bargain, and to agree or not to agree . . ."

The court also refused to accept the notion that petitioner had interjected costs as a defense to paying for increased benefits, and had thereby become obligated to furnish supporting information under the doctrine of *NLRB* v. *Truitt Mfg. Co.*, 351 U.S. 149.[8]

Nonetheless it found a violation.[9] It noted the Board's argument "that a party who withholds information that would significantly aid the bargaining process, only for the sake of keeping the other in the dark" is not bargaining in good faith. Applying this maxim to the case before it, it stated its holding—and

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[8] The court also rejected the contention, pressed by the union, that the enactment of the Welfare and Pension Disclosure Act of 1959, 72 Stat. 997, 29 U.S.C. § 301, had broadened an employer's duty to disclose under the National Labor Relations Act. The court found the Disclosure Act to be irrelevant to the delineation of rights under the NLRA.

[9] Notwithstanding the narrow violation found—the refusal to disclose cost information was the only asserted incident of lack of good faith—the order enforced by the court of appeals was not limited to the disclosure of such information, but broadly restrained Sylvania from interfering "in any like or related manner" with the union's bargaining efforts. This shotgun order of the Board, which would restrain activity unrelated to the particular conduct which the Board found offensive, should not be permitted to stand. *NLRB* v. *Express Publishing Co.*, 312 U.S. 426. *NLRB* v. *Celotex Corporation*, —— F. 2d —— (CA 5, June 28, 1966), 62 LRRM 2475.

its ground for distinguishing its earlier decision—as follows:

> "However, when the Union makes the same demand [for premium costs] in order better to evaluate the desirability of an increase in welfare benefits as against an equivalent increase in take-home pay, matters as to which the employer must bargain, the Board might properly conclude that the information, though collateral, was so necessary to effective negotiation that withholding it without good reason was inconsistent with the duty to 'exert every reasonable effort to make and maintain agreements', *NLRB* v. *Truitt Mfg Co. supra* at 152."

REASONS FOR GRANTING THE WRIT

1. The decision of the court below, which forges a novel and unsupportable standard in defining an employer's statutory duty to disclose information, will have important — and invidious — ramifications throughout the entire collective bargaining process. Ten years after this Court's decision in *Truitt*[10] and eight years after *Borg-Warner*,[11] the court of appeals seems to have seized upon *Truitt* to erase the essential distinction drawn in *Borg-Warner* between mandatory subjects such as wages, about which the parties must bargain, and non-mandatory subjects with respect to which the parties may at their own choosing bargain or not bargain.

Here, although the court of appeals correctly found that the union's request for information related to a subject outside the scope of "wages, hours, and other

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[10] *NLRB* v. *Truitt Manufacturing Co.*, 351 U.S. 149 (1956).

[11] *NLRB* v. *Wooster Division of Borg-Warner Corporation*, 356 U.S. 342 (1958).

terms and conditions of employment" and hence presumably outside the realm of any mandatory bargaining duty, it nonetheless found that because the information sought would have significantly aided the bargaining process, a statutory obligation to disclose such "collateral" information—costs—had arisen. Citing this Court's decision in *Truitt,* the court held that where collateral information was necessary to "effective negotiation," withholding it solely on the ground that there was no statutory duty to disclose it was inconsistent with good faith bargaining and thereby unlawful.

This, we submit, ascribes a breadth to the *Truitt* opinion which was neither intended by its authors nor reflected by its text. This Court held in that case that an employer had refused to bargain in good faith by refusing to supply the union with information in support of its assertion that it was financially unable to meet the union's demand for a wage increase. The Court noted, 351 U.S. at 152:

> "In their effort to reach an agreement here both the union and the company treated the company's ability to pay increased wages as highly relevant . . .
>
> "Good-faith bargaining necessarily requires that claims made by either bargainer should be honest claims. This is true about an asserted inability to pay an increase in wages. If such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy. And it would certainly not be farfetched for a trier of fact to reach the conclusion that bargaining lacks good faith when an employer mechanically repeats a claim of inability to pay without making the slightest effort to substantiate the claim."

The fault of the employer in *Truitt* was that he evidenced bad faith by cutting off any meaningful discussion on a matter that both parties treated as a vital issue. By adamantly maintaining that he could not meet the union's demands, but refusing to document his position, the employer unilaterally removed the question of wages from the negotiation.

In the case at bar, however, the court—although recognizing that the company was not pleading inability to pay and was bargaining solely on the basis of benefits to the employees—relied on *Truitt* as support for the premise that an employer must disclose whatever information might facilitate negotiations, i.e., might be useful to the union. There are of course innumerable items that could be useful to union negotiators. It would be decidedly to a union's advantage, for example, to know that a corporation's board of directors had authorized its negotiators to make concessions up to a certain limit, if necessary to avert a strike. Knowledge that an employer was engaged in performance of a substantial number of cost-plus contracts with the Government, so that even a steep wage increase would not come from the company's pocket but would be passed on to the Government as a cost of the contract, would undoubtedly strengthen the union's hand. Yet these matters are clearly outside the realm of mandatory bargaining, *International Woodworkers of America* v. *NLRB*, 263 F. 2d 483, 485 (C.A.D.C.).

Moreover, in extending the bargaining duty to matters which merely facilitate negotiation, irrespective of their non-mandatory character, the First Circuit has adopted a rationale at odds with that recently announced by the Seventh Circuit in *United Fire Proof*

Warehouse Co. v. NLRB, 356 F. 2d 494. There the Board had held that the employers violated the Act by claiming in negotiations that they were unable to do anything but reduce wages, while refusing to furnish certain financial records to the union in support of their claim. The employers had contended that no matter what their overall financial records revealed, they in any event wanted to make the local aspect of their moving operations profitable through a wage decrease applicable to all their operations.

The court denied enforcement of the Board's order. It put in proper perspective, we think, the duty of the employer to disclose, stating, 356 F. 2d at 498:

> "But the testimony does not indicate that they [the employers] contended they could not meet the wage increase requested, but rather that they simply would not meet it. Where the evidence disclosed 'won't', the Board found 'can't'.
>
> If the employers claimed that they were unable to pay, the union had a right to be shown evidence of inability. But when the employers refused to pay, the union knew all it was entitled to know. In such a situation, further financial information from the employers' records would be interesting and perhaps useful to the union, but not required; for such information cannot convert stubborn resolution into an excuse for failure to grant a wage increase or provide the basis for mutual bargaining concessions occasioned by a common understanding of financial plight."

The court of appeals' current *Sylvania* decision loses sight of the nature of the disclosure obligations for it confuses a bargaining relationship with a fiduciary one. Fiduciary status, with its attendant obligations of disclosure and accounting, is not properly a part of

the arms-length relationship which the very term "bargain" indicates should exist between an employer and a union. Inasmuch as the employer and the union are adversaries at the bargaining table, there is clearly no fiduciary relation between the two which would support any broad obligation of disclosure. Hence, to the extent that the courts have imposed such a duty upon the employer, it has been limited to situations where the information sought is necessary to the function of the bargaining representative if collective bargaining is to supplant individual bargaining.

The decision of the court below represents a departure from this standard borne out through judicial decisions not only in other circuits, but its own as well. Thus the cases holding that the collective representative has a right to know the wages of each individual in the bargaining unit, e.g., *Boston Herald-Traveler Corp.*, 223 F. 2d 58 (CA 1, 1955),[12] are not really disclosure cases at all, for each employee in the bargaining unit already knows what his rate of pay is. But since the law makes the majority representative the exclusive representative of all the employees in the unit, irrespective of their wishes, it follows that such representative is entitled to the sum of all the wage information in the possession of each individual employee in order to bargain for the group on this subject.

Accordingly it has been held that the requested information must be divulged where the union asked for lists of employees, their classifications and their current and prior salaries, *NLRB* v. *Yawman and Erbe Mfg. Co.*, 187 F. 2d 947 (CA 2); individual wage rates,

[12] This was cited by the court below in support of its decision.

NLRB v. *Whitin Machine Works*, 217 F. 2d 593 (CA 4) and *NLRB* v. *Leland Gifford Co.*, 200 F. 2d 620 (CA 1); lists of employees receiving merit increases, *NLRB* v. *J. H. Allison and Co.*, 165 F. 2d 766 (CA 6); lists of employees, salaries, length of service and merit increases, *NLRB* v. *The Item Company*, 220 F. 2d 956 (CA 5).

By the same token where the negotiated wage rates depend upon the operation of a piece-work system or job evaluation plan, the employee bargaining representative is entitled to know the methods of calculation so as to be able to ascertain the criteria for classification of wage payments and to determine whether the contract wage rates have actually been complied with. Decisions holding that employers have to provide such information, *Taylor Forge and Pipe Works* v. *NLRB*, 234 F. 2d 227 (CA 7) (point scores on job evaluation), and *J. I. Case Co.* v. *NLRB*, 253 F. 2d 149 (CA 7) (time studies), also do not assume any fiduciary status on the part of employers, for under the law of sales similar accounting may be obtained by purchasers from sellers where the right to payment depends upon deliveries of a certain quantity or quality. The disclosure in *NLRB* v. *Truitt Mfg. Co.* could likewise be compelled by a purchaser, for while a vendor in his negotiations may remain silent as to certain features of his product, he is not entitled to misrepresent them to the prospective purchaser.[13]

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[13] The fiduciary obligation of full and candid disclosure would arise in cases where the collective bargaining agreement establishes a limited trust arrangement. An example is a contributory group insurance plan, where the employer collecting the employees' share of the proceeds owes them a duty of accounting. *Phelps Dodge*, 101 NLRB 360.

The latter situation, according to the court of appeals, did not obtain here, for the court recognized that the company did not represent that it was unable to meet the costs of any plan. Since under these circumstances no danger of misrepresentation could possibly occur, the company under applicable principles of law was under no duty to document its position. See *United Fire Proof Warehouse Co.* v. *NLRB, supra.*

The new ground broken by the lower court's decision—that "collateral" information to mandatory subjects of bargaining must be furnished even though the employer's bargaining approach does not put them in issue—calls for clarification by this Court of the duty to disclose. Plainly under this rule a union's unilateral announcement that the information sought is "relevant" to its formulation of economic demands could compel an employer to disclose virtually every item of the cost of its operations to a group to which it owes no fiduciary duty. (Indeed, clarification of the extent of the employer's duty to disclose was sought by the Solicitor General five years ago with respect to the earlier *Sylvania* case (No. 417, October Term, 1961)). In view of the blurring of the established distinction between mandatory and non-mandatory subjects for bargaining, and the broad reading now given to the *Truitt* corollary, collective bargaining negotiations can be expected to founder as the parties jockey to assert their increasingly hazy legal rights in this area.[14]

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[14] It should be noted that this Court has recently granted certiorari in *NLRB* v. *Acme Industrial Co.*, No. 52, a case involving the refusal to furnish information to a union processing grievances under the grievance procedure of an existing contract.

2. In addition to the importance of the need to delineate the duty to furnish information during the course of bargaining negotiations in general, the decision of the court below raises issues of particular significance in the negotiation of the fringe benefits which have now become commonplace, such as the group insurance and pension programs involved here. As the Solicitor General stated in his petition (p. 6) in the earlier *Sylvania* case:

> "Clarification of the extent of the employer's statutory duty to furnish information while bargaining about a group insurance program is important, as a legal question, in the administration of Section 8(a)(5) of the National Labor Relations Act and, as a practical matter, in thousands of contract negotiations between employers and employees throughout the country."

The negotiation of welfare and pension plans has taken on major proportions in recent years. A study by the Department of Labor in 1964, analyzing plans on file with its Office of Labor-Management and Welfare-Pension Reports,[15] showed that almost eleven million employees were covered under collectively bargained pension agreements alone. Approximately nine million employees were subject to pension programs wholly financed by the employer. A Bureau of National Affairs study published this year of a broad grouping of selected collectively bargained plans containing some sort of social insurance revealed that ap-

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[15] *Labor Mobility and Private Pension Plans*, U.S. Dept. of Labor Bulletin No. 1407, p. 56, Table II (June, 1964).

proximately two-thirds of the plans were non-contributory.[16]

Plainly increased coverage under such plans has become a major union goal, and a focal point of collective bargaining. Additional complexities to the obligation of disclosure have been added by the enactment of the Welfare and Pension Disclosure Act of 1959, for compliance with its broad reporting requirements may conceivably wholly satisfy an employer's duty to disclose with respect to plans covered by the Disclosure Act provisions.

3. Finally, this Court should intervene to resolve the confusion where a circuit court, here the First Circuit, has permitted two conflicting decisions to stand as the law of the circuit. The three judge panel, consisting of two judges who did not sit in the earlier *Sylvania* case, explicitly and correctly affirmed the court's earlier view that costs to an employer of a non-contributory plan did not constitute "wages" within the meaning of the Act. Its ground for distinguishing the earlier case, however, was that here the Union demanded cost information "in order better to evaluate the desirability of an increase in welfare benefits as against the equivalent increase in take-home pay." Under these circumstances, the court asserted, the obligation to disclose collateral information came into play.

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[16] *Basic Patterns in Union Contracts*, The Bureau of National Affairs, p. 44:6 (January 1966). Moreover, at the close of last year there were 128,600 active welfare plans and 34,110 pension plans, not necessarily collectively bargained, on file with the Department of Labor. Thirty-six per cent of the welfare plans, and seventy-two per cent of the pension plans, were wholly financed by employers. 61 LRR 227 (April 18, 1966).

But precisely this contention was put to the court of appeals in the earlier *Sylvania* case,[17] and the court there rejected the very premise that it now adopts. The court in its concluding paragraph, 291 F. 2d at 132, pointed out:

> "Here, however, no issue of cost arose, for Sylvania at no point in its negotiations with the Union interposed cost as a factor bearing on its willingness to consider any proposal the Union might make with respect to changes in its employee insurance program. Saying that it took the cost of its insurance into account in arriving at the 'level of benefits to be offered to the employees' is not the equivalent of saying that it would not consider changes in its insurance program on account of cost. Sylvania provided the Union with all the information it required with respect to the scope and amount of the benefits of its insurance program and this is all the Union needed to formulate demands for changes in the program. *Demands for other or more extensive coverage could be formulated without reference to cost and so could demands for an increase in cash wages.* The cost of the insurance program would become an issue should Sylvania interpose that element as a ground for resisting a request for change in insurance coverage. When that occurs the time will come to decide whether Sylvania should provide cost data to support its position." (Emphasis supplied)

In view of the novel application of the doctrine of *stare decisis* by the court below, which now places both

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[17] The Solicitor General in his petition for certiorari in that case stressed that very contention (p. 9), asserting "As the Union pointed out during the negotiations, the employees in this unit might wish to change some of the types and levels of benefits, perhaps even without increasing the cost to the Company."

labor and management in a quandary as to their bargaining rights and duties under the law of the circuit, the exercise of this Court's power of supervision would appear to be called for.

CONCLUSION

For the foregoing reason, this petition for a writ of certiorari should be granted.

Respectfully submitted,

GERARD D. REILLY
LAWRENCE T. ZIMMERMAN
1120 Tower Building
Washington, D. C. 20005

BRUCE CARSWELL
JAMES P. HEFFERNAN
730 Third Avenue
New York, New York 10017

Attorneys for Petitioner

Of Counsel:
REILLY AND WELLS
1120 Tower Building
Washington, D. C. 20005

July 1966

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6623

SYLVANIA ELECTRIC PRODUCTS, INC., *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, ET AL., *Respondents.*

On Petition to Review and Set Aside an Order of The National Labor Relations Board

Before ALDRICH, *Chief Judge,*
McENTEE and COFFIN, *Circuit Judges.*

Gerard D. Reilly, with whom *Lawrence T. Zimmerman, Bruce Carswell, James P. Heffernan* and *Reilly and Wells* were on brief, for petitioner.

Warren M. Davison, Attorney, with whom *Arnold Ordman,* General Counsel, *Dominick L. Manoli,* Associate General Counsel, *Marcel Mallet-Prevost,* Assistant General Counsel, and *Allen M. Hutter,* Attorney, were on brief, for National Labor Relations Board, respondent.

Marilyn G. Rose, with whom *Irving Abramson* and *Ruth Weyand* were on brief, for Local 352, International Union of Electrical Radio and Machine Workers, AFL-CIO, intervening respondent.

Opinion of the Court

April 5, 1966.

ALDRICH, *Chief Judge.* In *Sylvania Electric Products, Inc.* v. *NLRB,* 1 Cir., 1961, 291 F.2d 128, *cert. den.* 368 U.S. 926, hereinafter *Sylvania,* we set aside an order of the National Labor Relations Board which required a bargain-

ing employer to disclose to the union the current and past costs of its noncontributory pension and insurance plans. We held that, although the benefits accruing to employees from such plans constituted "wages" that must be precisely disclosed, and as to which the employer must bargain, the cost to the employer was not. In the instant case, in the course of negotiations for a new labor contract, the employer offered the union a "package" that included improvements in existing welfare programs. Upon request the employer gave the union information relating to the cost of its current programs, but refused to furnish a breakdown of the cost of its proposed package, and hence of the welfare improvements. The union's reason for the demand was that it might prefer to retain the existing welfare plan, and opt for a higher wage rate rather than increased benefits. The employer countered that it bargained on the level of benefits, not costs, and that, in any event, it was not obligated to furnish the requested information.

The Board, adopting the trial examiner's report, held that by refusing to furnish the requested information the employer had failed to bargain in good faith, in violation of section 8(a)(5). It ordered the employer to furnish to the union "the costs or estimated costs" of the proposed improvements. In this petition to set aside the Board's order and cross-petition for enforcement, the Board, and the union, as intervenor, contend alternatively that our decision in *Sylvania, supra,* is distinguishable, and that it should be overruled.

In *Sylvania, supra,* the Board reasoned, "As the premiums paid by the Respondent constitute wages, it logically follows that the premium cost data requested by the Union relates directly to the matter of wages." We responded that "to define an employer's contribution to a non-contributory welfare program as 'wages' to the employees . . . would expand the concept of wages so far as to break down if not destroy, the distinction in the Act between 'wages,

hours, and other terms and conditions of employment,' as to which there is a mutual mandatory duty to bargain collectively, and those matters as to which 'each party is free to bargain or not to bargain, and to agree or not to agree.' " citing *NLRB* v. *Borg-Warner Corp.*, 1958, 356 U.S. 342, 349. The union now takes the same position as the Board in the earlier case, asserting, further, that *Sylvania* is inconsistent with the Welfare and Pension Disclosure Act of 1959, hereinafter Disclosure Act.[1]

We see nothing in the Disclosure Act inconsistent with our earlier view. The Act does not purport to expand the scope of "wages, hours, and other terms and conditions of employment" under the National Labor Relations Act. In fact, it does not purport to affect the course of collective bargaining relations at all. Rather, the Disclosure Act seems designed to protect the rights of employees covered by actual, not proposed, welfare programs, by compelling the employer who administers them to make disclosures of the sort owed by a fiduciary to *cestuis que trustent.*

The Board takes a narrower view. It now asserts that meaningful bargaining as to "wages, hours and other terms and conditions of employment" may require a party to disclose information on matters that do not themselves fall within that phrase. More particularly, the Board says that a party who withholds information that would significantly aid the bargaining process, only for the sake of keeping the other in the dark, may not be, and is not in this case, bargaining in good faith. We accepted that principle in *Boston Herald-Traveller Corp.* v. *NLRB*, 1 Cir., 1955, 223 F.2d 58. See also *NLRB* v. *Truitt Mfg. Co.*, 1956, 351 U.S. 149. Its application involves questions of degree, including degrees of relevance.

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[1] 72 Stat. 997, 29 U.S.C. § 301 *et seq.* Although enacted in 1959, this Act was not in effect at the time of our prior decision, and was not then called to our attention.

An employer is not required to disclose welfare plan cost information for the purpose of bargaining about whether he is receiving the best coverage for his money, because he is not obliged to discuss this matter with the union. *Sylvania, supra.* However, when the union makes the same demand in order better to evaluate the desirability of an increase in welfare benefits as against an equivalent increase in take-home pay, matters as to which the employer must bargain, the Board might properly conclude that the information, though collateral, was so necessary to effective negotiation that withholding it without good reason was inconsistent with the duty to "exert every reasonable effort to make and maintain agreements." *NLRB* v. *Truitt Mfg. Co., supra,* at 152.

The order of the Board will be enforced.

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are as follows:

> SEC. 8. (a) It shall be an unfair labor practice for an employer—
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> * * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).
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> * * * * * *
>
> (d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negoti-

ation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later;

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become

inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

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